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48 CFR Parts 205, 208, 212, *et al.*

Defense Acquisition Regulations System; Defense Federal Acquisition Regulation Supplement; Only One Offer (DFARS Case 2011–D013); Defense Federal Acquisition Regulation Supplement: Shipping Instructions (DFARS Case 2011–D052) and Defense Federal Acquisition Regulation Supplement: Applicability of Hexavalent Chromium Policy to Commercial Items (DFARS Case 2011–D047); Final Rules

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 205, 208, 212, 214, 215, 216, 252

RIN 0750-AH11

Defense Acquisition Regulations System; Defense Federal Acquisition Regulation Supplement; Only One Offer (DFARS Case 2011-D013)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to address acquisitions using competitive procedures in which only one offer is received. This rule implements a DoD Better Buying Power initiative. The revisions to this rule are part of DoD's retrospective plan under Executive Order 13563 completed in August 2011.

DATES: *Effective Date:* June 29, 2012.

FOR FURTHER INFORMATION CONTACT: Ms. Amy G. Williams, telephone 571-372-6106.

SUPPLEMENTARY INFORMATION: DoD's full plan can be accessed at <http://exchange.regulations.gov/exchange/topic/eo-13563>.

I. Background

DoD published a proposed rule in the *Federal Register* at 76 FR 44293 on July 25, 2011, to address acquisitions using competitive procedures in which only one offer is received. This rule was initiated to implement one of the aspects of the initiative on promoting real competition that was presented by the Under Secretary of Defense for Acquisition, Technology, and Logistics (AT&L) in a memorandum dated November 3, 2010. This memorandum was further implemented by

memoranda from the Director, Defense Procurement and Acquisition Policy, dated November 24, 2010, and April 27, 2011.

Some of the other background events leading up to publication of this rule are summarized as follows:

- In 2007, an Acquisition Advisory (SARA) panel report discussed methods to encourage competition focused on longer solicitation periods as well as improved requirements generation and market research/industry communication.

- In 2008, the Office of Management and Budget and Office of Federal Procurement Policy issued a memorandum detailing agencies' efforts to improve competition where only one offer was received. These efforts involved such steps as limiting contract length, minimizing unique or brand name specifications, and enhancing acquisition planning.

- In 2010, the Government Accountability Office studied reasons why only one offer is received, and concluded that several factors contributed, such as a strong incumbent, restrictive Government requirements, and/or bundling of requirements into larger acquisitions.

The comment period closed on September 23, 2011, but was re-opened on September 27, 2011 (76 FR 59623) through October 7, 2011. DoD received comments on the proposed rule from 19 respondents.

II. Discussion and Analysis of the Public Comments

DoD reviewed the public comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

A. Summary of Significant Changes From the Proposed Rule

1. *DFARS 215.371-1.* A section on policy has been added at DFARS 215.371-1 to replace the proposed

paragraph DFARS 215.371(a). The policy statement is completely rewritten to shift the emphasis away from whether the circumstances described at FAR 15.403-1(c)(1)(ii) constitute adequate price competition, to an emphasis on the objectives of the rule, i.e., to increase competition and, if only one offer is received nevertheless, to make sure that the price is fair and reasonable and that the statutory requirements for obtaining certified cost or pricing data are met.

2. *DFARS 215.371-2.* A section has been added to address the efforts to promote competition, similar to the coverage in the proposed rule at DFARS 215.371(c)(1). In response to public comments, two FAR references have been added to provide considerations on revising requirements to promote competition (FAR 6.502(b) and 11.002).

3. *DFARS 215.371-3* has been added to address the process for obtaining fair and reasonable prices, replacing the proposed paragraph DFARS 215.371(c)(2). The contracting officer is not required to obtain further cost or pricing data if the contracting officer determines that the offered price is fair and reasonable on the basis of cost or price analysis and that adequate price competition exists, in accordance with FAR 15.403-1(c)(1)(ii), or another exception to the statutory requirement for certified cost or pricing data applies (see Truth in Negotiations Act (10 U.S.C. 2306a) and FAR 15.403-4). Otherwise, the contracting officer must obtain additional cost or pricing data, and that data must be certified, unless an exception to the requirement for certified cost or pricing data applies. The following table provides a summary of the requirement for cost or pricing data and whether the data must be certified, depending on whether the contracting officer can determine the price to be fair and reasonable and whether an exception to the requirement for certified cost or pricing data applies.

	Circumstance 1	Circumstance 2	Circumstance 3	Circumstance 4	Circumstance 5
Contracting officer (c.o.) determines price fair & reasonable?	YES	YES	YES	NO	NO
C.o. determines adequate price competition? (approved 1 level above c.o.)	YES	NO	NO	X*	X
Another TINA exception applies?	YES	NO	YES	NO
Cost or pricing data required?	NO	NO	YES	YES	YES

	Circumstance 1	Circumstance 2	Circumstance 3	Circumstance 4	Circumstance 5
Data must be certified?	N/A	N/A	YES	NO	YES

* Note that the contracting officer cannot determine that adequate price competition exists if cannot determine that the price is fair and reasonable.

4. Two exceptions have been added at DFARS 215.371-4 (proposed at DFARS 215.371(e)):

- An exception to the 30-day resolicitation period has been added to address the application to small business set-asides.

- The final rule states that it does not apply to broad agency announcements.

5. Waivers are now addressed at DFARS 215.371-5 (proposed at DFARS 215.371(d)), but the coverage of waivers is otherwise unchanged.

6. The proposed statement at DFARS 215.403-1(c)(1)(B) has been modified to reference back to the procedures at DFARS 215.371-3 for ensuring a fair and reasonable price if only one offer is received. DFARS 215.371-3 makes it clear that adequate price competition, as described at FAR 15.403-1(c)(1)(ii), cannot be used for the purpose of determining that a price is fair and reasonable.

7. The rule no longer addresses acquisitions under FAR subpart 13.5, because that statutory authority has expired.

8. Statements have been added at DFARS 208.404(a) and 214.404-1(2) to specify clearly the deviation from the statements in the corresponding FAR sections.

B. Analysis of Public Comments

1. Meaning of “Only One Offer”

Comment: One respondent stated that what constitutes one offer should be more clearly defined. The respondent questioned whether this includes only technically acceptable, timely offers.

Response: For the purpose of DFARS 215.371, an offer includes any timely offer or late offer accepted by the contracting officer. There is no requirement for each offer to meet the requirements at FAR 15.403-1(c)(1)(i) in order to count as more than one offer received. However, if after evaluations the contracting officer determines only one responsive offer was received, the contracting officer will need to review the standards at FAR 15.403-1(c) to determine if adequate price competition exists or another exception applies, and take the appropriate steps to ensure a fair and reasonable price.

Comment: One respondent questioned whether this rule is applicable to the solicitation of quotations. The

respondent noted that quotations are solicited routinely when using the procedures of FAR subpart 8.4.

Response: This rule is applicable to quotes as well as offers. Quotes should be treated the same as offers, for the purposes of this rule. The term “offer” used in the provision is comprehensive enough to apply to all competitive acquisitions subject to the final rule. Specifically, the term “offer” appropriately applies to acquisitions exceeding the simplified acquisition threshold conducted under FAR parts 8, 12, 14, 15, and 16. FAR defines “offer” to include responses to invitations for bids (sealed bidding) and responses to requests for proposals (negotiation), but to exclude responses to requests for quotations (RFQs). However, DFARS parts 208 and 216 already use the term “offer” in reference to orders awarded under those subparts. Finally, the final rule does not apply to acquisitions below the simplified acquisition threshold awarded based on quotations received. Therefore, the provisions in the final rule, because they use the term “offer,” can be used appropriately for competitions under FAR parts 8, 12, 14, 15, and 16 exceeding the simplified acquisition threshold.

2. Promoting Competition

a. General

Comment: One respondent asked whether the policy should promote the receipt of two or more offers on all competitive procedures exceeding the simplified acquisition threshold.

Response: The intent of the DoD Better Buying Power initiative is to promote competition on all competitive solicitations. The policy at DFARS 215.371-1(a) does promote the receipt of two or more offers in response to competitive solicitations, unless an exception applies.

Comment: One respondent stated that the proposed rule approach to increasing competition “mistakenly conflates a post-proposal requirement for submitting cost or pricing data after receipt of offer with steps needed to increase DoD competition, but does nothing to address the root causes of the lack of competition.”

Response: The rule requires the contracting officer to consult with the requiring activity as to whether the requirement should be revised in order

to promote more competition and requires resolicitation if the solicitation allowed fewer than 30 days for receipt of proposals. The post-proposal requirement for cost or pricing data addresses the second objective of the rule—to obtain fair and reasonable prices.

Comment: One respondent stated that the rule may result in decreased competition. This respondent pointed to unintended reduction in the number of competitors and in the ability to maintain long term strategic defense capabilities, because of a shift to “lowest price possible.” Further, according to this respondent, some potential offerors may not be willing to participate if they may subsequently be required to submit cost or pricing data.

Response: The intent of the rule is not to seek the lowest price, but a best value at a competitive price. If two or more offerors respond to a requirement or if the contracting officer determines that the offered price is fair and reasonable and an exception to the requirement for certified cost or pricing data applies, then the contracting officer is not required to ask for additional cost or pricing data.

b. Time Period for Response

Comment: Various respondents were in favor of extending solicitation periods to allow potential offerors more time to assemble a competitive offer. One respondent stated that this is generally a step in the right direction, and another stated that this will likely result in increased competition. One respondent stated that the proposed 30 additional days is both reasonable and appropriate.

Response: None required.

Comment: One respondent stated that it is difficult to understand why any solicitation would be advertised for less than 30 days if not covered by one of the excepted circumstances. The respondent recommended that DoD should issue conforming instructions that all solicitations must comport with the rule at FAR 5.203, except as specified in the proposed exception at DFARS 215.371(e)(1)(ii) (now at 215.371-4) for contingencies. FAR 5.203(c) requires agencies to allow at least a 30-day response time for receipt of bids or proposals from the date of issuance of a solicitation, if the

proposed contract action is expected to exceed the simplified acquisition threshold, except for acquisition of commercial items (paragraph (a)) or in the general category of "annual forecast" (paragraph (h)).

This respondent also stated that adding transactional process time in all cases where only a single offer is received in response to a competitive solicitation is contrary to sound acquisition policy.

Response: Federal Supply Schedules and indefinite-delivery/indefinite-quantity contracts allow for shorter solicitation times. The final rule does not require added transactional time in all cases. Encouraging competition is sound acquisition policy. The rule also allows the head of the contracting activity to waive the 30-day solicitation requirement, when appropriate.

Comment: One respondent was concerned that resoliciting will expose the fact to industry prematurely that there was only one offeror. Since this respondent saw little probability that the additional 30 days would result in additional offerors, this respondent foresaw that the offeror would not reduce the price, but would raise the price under the resolicitation.

Response: If there is still only one offer after resolicitation and negotiations ensue, the rule states that the contracting officer should not negotiate a higher price than was originally proposed. As defined in FAR 2.101, "should" means "an expected course of action unless inappropriate for a particular circumstance." An offeror raising the price because there is no competition would not be an appropriate reason for negotiating a higher price.

Comment: Another respondent stated that by virtually mandating a 30-day solicitation period, this rule will delay the acquisition of critical items and, in many cases, not offer any cost savings. This respondent recommended use of other methods than resolicitation for determining price reasonableness if it is believed that resolicitation will not result in reduced pricing.

Response: The Government does not require that all solicitations be announced for 30 days. If market research indicates a commercial market with multiple potential offerors that will be able to respond in fewer than 30 days, then the contracting officer may issue the solicitation for fewer than 30 days. Resolicitation is used to increase competition, not as a method to determine price reasonableness. For specifics with regard to application in FAR parts 12 and 16, see also the

responses in sections II.B.6.b. and 6.d. of this preamble.

Comment: One respondent requested that the new rule should specify which parts of the DFARS are subject to the 30-day requirement.

Response: The rule specifies the parts to which it is applicable (DFARS parts 205, 208, 212, 214, 215, and 216). It may apply indirectly to other parts to the extent that the acquisition procedures of these parts are used. An exception has been added to state specifically that the rule does not apply to broad agency announcements. An exception to the 30-day resolicitation requirement, if only one offer is received, has also been added for small business set-asides.

c. Requirements

Comment: Several respondents agreed that encouraging revised statements of work in appropriate circumstances would likely result in increased competition, and were in favor of these proposed revisions. One respondent stated that the reason why only one offer was received in part is likely because the requirement is too restrictive in its content, so that rewording the requirement can facilitate more offers.

Several respondents stated that the proposed rule did not adequately address the process for amending the solicitation when only one offer is received due to flawed solicitation requirements, specifications, contract types, etc. One respondent stated that DoD should set forth guidelines and/or criteria for determining when and how a solicitation should be revised.

Response: It is a duty of the competition advocate to challenge requirements that are not stated in terms of functions to be performed, performance required, or essential physical characteristics and identify any condition or action that has the effect of unnecessarily restricting competition (FAR 6.502(b)(1)). FAR 11.002 provides policy on stating requirements in a way to maximize competition. A cross reference to these FAR citations has been added at DFARS 215.371-2(a).

3. Fair and Reasonable Prices

a. Relationship Between Adequate Price Competition and Determination of Fair and Reasonable Price

FAR references:

Current coverage at FAR 15.403-1(c) provides three circumstances in which a price is based on adequate price competition, for the purpose of deciding whether there is an exemption to the requirement for certified cost or pricing data:

- In the first circumstance, two or more responsible offerors, competing independently, submit priced offers that satisfy the Government's expressed requirement, if award will be made to the offeror whose proposal represents the best value where price is a substantial factor in source selection, and there is no finding that the price of the otherwise successful offeror is unreasonable. In this circumstance, there is a presumption of price reasonableness. Any finding that the price is unreasonable must be supported by a statement of the facts and approved at a level above the contracting officer.

- In the second circumstance, there was a reasonable expectation, based on market research, that two or more responsible offerors, competing independently, would submit priced offers in response to the solicitation's expressed requirement, even though only one offer is received from a responsible offeror; and the determination that the proposed price is based on adequate price competition and is reasonable, must be approved at a level above the contracting officer. This standard for adequate price competition was added to the two pre-existing standards in the FAR in October 1995 (FAC 90-32) as a result of sections 1202 and 1251 of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 105-355). These sections required the FAR to provide clear standards for application of the exceptions to the requirement for submission of cost or pricing data (including adequate price competition).

- In the third circumstance, price analysis clearly demonstrates that the proposed price is reasonable in comparison with current or recent prices for the same or similar items, adjusted to reflect changes in market conditions under contracts that resulted from adequate price competition. Note that the requirement that price analysis be based on contracts that resulted from adequate price competition does not cover buys in which the price is determined fair and reasonable based on certified cost or pricing data from previous production buys. This standard has been in the regulations since May 1964, when adequate price competition was first addressed in the Armed Services Procurement Regulation (3-807.1(b)).

Comment: One respondent fully supported DoD's proposal that 30-day solicitations that produce only one offer should trigger a price or cost analysis. This respondent stated that it has long advocated the position that adequate price competition does not exist where

only one offer is received pursuant to a competitive solicitation.

Other respondents wanted to preserve the exception at FAR 15.403–1(c)(1)(ii) as a valid exemption from the requirement for certified cost or pricing data, while some acknowledged the need for better enforcement of FAR 15.403–1(c)(1)(ii)(B), i.e., the need to determine at a level above the contracting officer that the price is reasonable.

One respondent had reservations about the apparent elimination of agency discretion to find adequate price competition when a single offer is received, following the expectation of multiple offers. The respondent expressed concern that because the FAR does not reflect the same approach, there is a risk of confusion in the acquisition community. This respondent cited a GAO 2010 study, which recommended case-by-case analysis of single offers, not elimination of the discretion to find adequate price competition when a single offer is received. This respondent also quoted a 2009 DoD statement that “the receipt of a single offer does not necessarily indicate a lack of competition (DoD’s 2009 Competition Report).

Several respondents stated that the current FAR reflects the processes required of the contracting officer to protect DoD’s interests in a fair and reasonable price in those situations where competition was expected, but, for whatever reason, is not achieved.

Another respondent considered that the requirement at FAR 15.403–1(c)(1)(ii) has been misused, because contracting officers confuse the adequate price competition definition of expected competition in the exception as also covering the adequate price competition pricing method of comparing proposals in FAR 15.404–1(b)(2)(i). FAR 15.404–1(b)(2)(i) states that one price analysis technique is “Comparison of proposed prices received in response to the solicitation. Normally, adequate price competition establishes a fair and reasonable price (see FAR 15.403–1(c)(1)).” The respondent recommended that we clarify the need for separate price analysis before concluding that the standard for adequate price competition has been met.

Similarly, another respondent recommended more rigorous enforcement of the existing price reasonableness test in FAR 15.403–1(c)(1)(ii) and (iii) for adequate price competition, without further regulatory change to prohibit DoD contracting officers from using the exception. Another respondent concurred that the

problem is not the tool but the improper use of the tool. The respondent recommended maintaining the standards at FAR 15.403–1(c)(1)(ii). A third respondent stated that current methods are adequate to attain the desired benefit, but without “completely undercutting the existing acquisition process.”

Response: In response to public comments, DoD has reassessed the proposed statement of policy at DFARS 215.371 in order to better reflect the fundamental purpose of the rule. The policy statement at DFARS 215.371–1 has been revised to clarify that if only one offer is received in response to a competitive solicitation, it is DoD policy—

- To take the required actions to promote competition; and
- To ensure, if the steps to promote competition still do not result in more than one offer, a fair and reasonable price and compliance with the statutory requirements for certified cost or pricing data, unless an exception applies.

The proposed rule statement that the circumstance of “reasonable expectation * * * that two or more offerors, competing independently, would submit priced offers,” as further described at FAR 15.403–1(c)(1)(ii), does not constitute adequate price competition if only one offer is received” is not included in the final rule. The second element in the statement of policy, which reflects one of the ultimate goals of the proposed rule, shifts the focus from determining the existence of “adequate price competition” to achieving a “fair and reasonable price.”

There are two citations in the FAR that have contributed to the confusion regarding the relationship between the determination that adequate price competition exists and the determination that a price is fair and reasonable.

Until a recent technical amendment, FAR 15.403–1(c)(1)(ii), which addresses “only one offer,” included as a standard for adequate price competition the requirement that “The determination that the proposed price is based on adequate price competition, is reasonable, and is approved at a level above the contracting officer;”. The technical amendment restored the original wording, which had become inadvertently unclear in the process of a major rewrite of FAR part 15, to read as follows:

“The determination that the proposed price is based on adequate price competition and is reasonable has been approved at a level above the contracting officer;”

This makes it unambiguous that it is the price that must be reasonable, not the determination, and that this determination of reasonable price is an essential part of the determination that adequate price competition exists.

However, FAR 15.404–1(b)(2)(i) makes the statement that “Normally, adequate price competition establishes a fair and reasonable price (see FAR 15.403–1(c)(1)).” This statement is overly broad. Although “adequate price competition” and “fair and reasonable price” are inextricably linked, only adequate price competition as described at FAR 15.403–1(c)(1)(i) can be used as the basis to determine that the price is fair and reasonable. FAR 15.403–1(c)(1)(i) involves the receipt of offers from two or more responsible sources, competing independently. That this is what was intended at FAR 15.404–1(b)(2)(i) is clear from the lead-in sentence, which addresses the comparison of proposed prices received in response to the solicitation as a price analysis technique.

The perception that “based on adequate price competition” can be used as sufficient basis to determine that a price is fair and reasonable is clearly untenable for the standards in FAR 15.403–1(c)(1)(ii) and (iii), both of which require a determination of price reasonableness as part of the determination that adequate price competition exists. Since there is no adequate price competition under FAR 15.403–1(c)(1)(ii) until a level above the contracting officer has found the price to be “reasonable,” the determination that the price is fair and reasonable in the case of only one offer cannot be based on “adequate price competition,” as in the case when multiple offers are received, but must be based on another type of cost or price analysis. The cost or price analysis in the case of paragraph (ii) is not subject to the particular restrictions imposed in paragraph (iii).

The respondents, therefore, have a point when they state that the problem with the determination that “only one offer” can constitute adequate price competition lies primarily in the misuse of that determination as a basis to assume that the price is fair and reasonable.

Therefore, DoD has revised the final rule to emphasize that, although FAR 15.403–1(c)(1)(ii) may be used to determine that adequate price competition exists for purposes of an exemption from the requirement to obtain certified cost or pricing data, that determination of adequate price competition can only be made in conjunction with the determination that

the price is fair and reasonable, based on cost or price analysis, not just relying on “adequate price competition.” If the price can be determined to be fair and reasonable based on cost or price analysis and the appropriate determination is approved at one level above the contracting officer that the other criteria for adequate price competition have been met, or another exception to the requirement for certified cost or pricing data applies, then there is no need for any additional cost or pricing data.

Comment: One respondent expressed serious concerns that full and open competition is no longer the model to determine a fair and reasonable price when single offers are received, and that a price achieved through full and open competition is only a starting point for further negotiation.

Response: As already stated, “full and open competition” (i.e., adequate price competition) cannot be the basis for determining a fair and reasonable price when only one offer is received, because the determination that adequate price competition exists cannot be made until a separate determination has been made that the price is fair and reasonable.

Comment: One respondent considered it “inexplicable” that the proposed rule does not recognize the requirements of FAR 15.403–1(c)(1)(iii) to perform price analysis as contributing to the informed contracting officer decision about adequate price competition and price reasonableness.

Response: Although a prior memorandum of November 24, 2010, from the Director, Defense Procurement and Acquisition Policy (DPAP), included a restriction of reliance on the standard at FAR 14.303–1(c)(1)(iii) for determining adequate price competition, the subsequent DPAP memorandum of April 27, 2011, and the proposed rule only restricted reliance on the exception at FAR 15.403–1(c)(1)(ii). Therefore, FAR 15.403–1(c)(1)(iii) could still be relied upon to determine adequate price competition, if the criteria can be met. Note that this exception only applies if the prices of the prior contracts resulted from adequate price competition.

Comment: One respondent questioned the lack of empirical data to back up the statement in the September 14, 2010, Carter memo that DoD contracting officers were not performing cost or price analysis on single bid offers.

Response: Although DoD does not have extensive data, there is concern based on anecdotal evidence that when there was an expectation of competition but only one offer was received, in too many instances there was not a serious

independent cost or price analysis to determine that the price was fair and reasonable. The GAO Report of July 2010 (GAO–10–833, Federal Contracting: Opportunities Exist to Increase Competition and Assess Reasons When Only One Offer Is Received), found that some contracting approaches (about 10 percent of sample reviewed) did not reflect sound procurement or management practices, including some with very limited documentation of the reasonableness of proposed prices.

b. Requirement for More Data

i. Statutory Exemptions From Requirement To Submit Certified Cost or Pricing Data

Comment: Several respondents requested clarification of when data other than certified cost or pricing data applies. Several respondents were further concerned that the proposed rule conflicted with underlying legislation and regulation that prohibit requesting (certified) cost or pricing data in certain circumstances. The respondent requested clarification of the rule to exempt procurements for commercial items or procurement to which another exception applies. The respondent reiterated that agencies are statutorily prohibited from requiring certified cost or pricing data where any exception applies.

Another respondent stated that the rule should state explicitly that unless a waiver is granted or it is a commercial item, the data would always be certified cost or pricing data. This respondent recommended a specific change in the final rule, adding a new paragraph DFARS 215.371(c)(2)(i) to specifically add the requirement to “Determine if an exception to certified cost or pricing data is necessary and/or applicable.”

Further, another respondent stated that submission of other than certified cost or pricing data should never be a substitute for the submission of certified cost or pricing data. Accordingly, the respondent believed that if only one offer is received, then the submission of certified cost or pricing data should be required in order to conclude that a fair and reasonable price has been established.

Response: The final rule has been revised to make it clearer when additional cost or pricing data is required and when that data must be certified. DFARS 215.371–3(b)(2)(i) states that “For acquisitions that exceed the cost or pricing data threshold, if no exception at FAR 15.403–1(c) applies, the cost or pricing data shall be certified.” The rule does not override

any of the statutory exemptions from the requirement to require certified cost or pricing data, as set forth at FAR 15.403–1(c).

ii. Impact of Requesting Unnecessary Additional Data

Comment: One respondent stated that although obtaining insight into some single offer procurements may be appropriate, the respondent believes that the goal can be better achieved by better enforcing the existing rules. The respondent cited FAR 15.402(a)(3), which states that “Contracting officers shall obtain the type and quality of data necessary to establish a fair and reasonable price, but not more data than is necessary. Requesting unnecessary data can lead to increased proposal preparation costs, generally extend acquisition lead time, and consume additional contractor and Government resources.”

Similarly, another respondent objected that the proposed rule effectively shifts the burden for price reasonableness to the offeror, by requiring them to provide either certified cost or pricing data or data other than certified cost or pricing data automatically, in response to several new clauses authorizing the contracting officer to demand such data when a single offer is received. According to the respondent, this rule creates the de facto presumption that any single offer outcome is unreasonable. This respondent recommended that supporting data should be restricted to pricing data and prohibit the contracting officer from requesting cost data or profit figures (per the SARA panel). The respondent further stated that if cost data is necessary, it should not require certification.

Several respondents feared a negative impact because of the proposed rule requirement for submission of cost or pricing data when only one offer is received.

One respondent stated that the uncertainty at the time of offer as to whether cost or pricing data will later be required, imposes an unanticipated burden of gathering such data. The respondent was concerned that this uncertainty may increase prices, drive away competitors, especially nontraditional suppliers, from submitting offers, and thus increase the number of single offers received.

Another respondent stated that the demand for additional data will add to the enormous industry bid and proposal cost burden. The respondent further stated that requiring cost or pricing data is contrary to sound acquisition policy

and will negatively impact mission performance accomplishment.

Response: The final rule has been revised to narrow the circumstances in which the contracting officer will request additional cost or pricing data. The rule now clarifies that, in competitive environments when only one offer is received, the contracting officer is only required to obtain enough data to establish fair and reasonable prices and to comply with any statutory requirement for certified cost or pricing data. If the contracting officer determines that the proposed price is fair and reasonable (through cost or price analysis using any data from the same or similar products or services previously procured) and that adequate price competition exists (the determination approved at one level above the contracting officer) or another exception to the requirement for certified cost or pricing data applies, then no further data is required. However, if the contracting officer cannot make the preceding determination, then the contracting officer must request additional cost or pricing data, and that data must be certified, unless another exception to the requirement for certified cost or pricing data applies (e.g., commercial items, or below the certified cost or pricing data threshold).

The provision at DFARS 252.215–7008 has been revised in the final rule so that it no longer automatically requires additional data if only one offer is received. The provision notifies offerors that the contracting officer may request additional cost or pricing data if only one offer was received and if additional cost or pricing data is required in order to determine whether the price is fair and reasonable. In addition, the provision has been revised so that an offeror, by submission of its offer, agrees to provide any data requested by the contracting officer in accordance with FAR 52.215–20.

c. Negotiations

Comment: Several respondents commented on the requirement that the negotiated price should not exceed the offered price. One respondent asked whether a FAR deviation from FAR 15.306(d), Exchanges with offerors after establishment of the competitive range, was being processed for DFARS 215.371(c)(2)(ii), which states in part that “If the contracting officer decides to enter negotiations, the negotiated price should not exceed the offered price.”

Response: FAR 1.304 provides that agency regulations may be inconsistent with the FAR as provided in FAR subpart 1.4, Deviations from the FAR.

FAR 1.404(b) provides that for DoD, class deviations are controlled, processed, and approved in accordance with the DFARS. DPAP is the approval authority for class deviations or changes to the DFARS that constitute a permanent deviation from the FAR. Incorporation of a policy or procedures in the DFARS is sufficient to establish that a policy or procedure different from the FAR is applicable to DoD. DoD only processes a deviation from the FAR as a separate document when there is insufficient time to incorporate the changes in the DFARS or the incorporation in the DFARS is inappropriate for some other reason.

Comment: One respondent stated that both discussions and negotiations could reveal errors that would lead to revised proposals either lower or higher than the offered price. Additionally, the respondent expressed concern that the definition of “should” is different to each individual. Another respondent recommended striking the limitation that negotiated price should not exceed offered price from paragraph (c) of proposed DFARS 252.215–70XX.

Response: The term “should” is defined at FAR 2.101 (see response to third comment under section II.B.2.b.). If discussions or negotiations reveal errors that would lead to revised proposals, then that could constitute sufficient rationale to diverge from the norm of “should” and negotiate a higher price.

Comment: One respondent cited the 20 percent likelihood that there will be only one offer as cause for offerors to back away from making an initial offer, because if there is only one offer, then the offeror will be forced to negotiate further with their offered price as ceiling. The respondent also sees an impact on contracting officers because of the difference between the FAR and the DFARS, causing “more confusion among DoD contracting officers about the negotiation process.”

Response: The rule has been revised so that negotiations only ensue when the contracting officer cannot determine that the offered price is fair and reasonable (also see response to previous section II.B.3.b.ii.).

Comment: One respondent had some technical comment with regard to entering negotiations under DFARS part 214. The respondent recommended inclusion of several references (at DFARS 214.404–1(1) and (2) and 214.408–1(b)) to FAR 14.404–1(f), which allows sealed bidding to convert to negotiated in lieu of cancellation required by FAR 14.404–1(c).

Response: The DFARS supplementation of FAR 14.404–1 has

added a reference to FAR 15.404–1(f) to clarify that the DFARS procedures at DFARS 215.371 supersede the procedures at FAR 14.404–1(f).

4. Exceptions in Proposed Rule

a. Simplified Acquisition Threshold

Comment: Three respondents recommended increasing the proposed threshold for application of the rule from the simplified acquisition threshold to \$10 million. One respondent stated that the rule should exempt acquisitions less than \$10 million, in order to return the highest level of benefit from the burdens imposed by submission of cost or pricing data and negotiation.

Similarly, another respondent recommended the \$10 million threshold in order to focus the requirements on the competitions in which fostering effective competition would have the most beneficial impact to DoD and for which a failure to perform adequate cost or price analysis of single offers could result in the most detriment to DoD.

A third respondent provided the rationale that, especially for procurement of services, for many procurements of less than \$10 million associated with re-competes, other contractors determine that based on a cost-benefit analysis, the cost of writing and submitting a proposal exceed the potential benefits associated with the acquisition.

Response: The simplified acquisition threshold is currently \$150,000, with higher thresholds for contingency operations or to facilitate the defense against nuclear, biological, chemical, or radiological attack (which are exempt from this rule). Another possible threshold that was considered is the threshold for certified cost or pricing data (\$650,000). DoD decided to retain the simplified acquisition threshold as the threshold for application of this rule. It is not to the benefit of DoD to exempt acquisitions up to \$10 million from this rule, or even \$650,000, especially as the final rule has been revised to eliminate any unnecessary burden. It is important at every dollar value to maximize competition and determine that prices are fair and reasonable. The primary reasons that buys below the simplified acquisition threshold have been exempted from this rule are because—

- 41 U.S.C. 1901 requires that in order to “promote efficiency and economy in contracting and to avoid unnecessary burdens,” the FAR shall provide simplified procedures for acquisitions not greater than the simplified acquisition threshold; and

- It is simply not feasible to apply the rule to the huge volume of very low dollar value buys, a large majority of which are conducted electronically.

b. Contingency Contracting

Comment: One respondent viewed the exception for contingency contracting as a serious defect. The respondent referenced the Commission on Wartime Contracting as evidence that DoD's non-competitive procurement practices in contingency operations have resulted in billions of dollars of waste. The respondent, therefore, recommended that either the exception be deleted, or a rigorous set of guidelines be included in the final rule, to limit the instances in which such an exception could be granted.

Response: An exception for actions in support of contingency operations is provided due to the urgent nature of actions and the need for flexibility in theater in order to remain responsive. Application of the exception does not eliminate the need for the contracting officer to seek maximum practicable competition and ensure that the price is fair and reasonable. The intent of the proposed rule is to drive behavior to enhance real competition whenever possible and to obtain a fair and reasonable price. To establish a rigorous set of guidelines to limit instances in which an exception could be granted in a contingency environment could severely limit the flexibility of the contracting officer in these instances. DoD is also reviewing the findings/recommendations of the Commission on Wartime Contracting and placement of additional safeguards and remedies to promote competition in a contingency environment.

5. Waiver

Comment: One respondent criticized the waiver provision for being "unlimited" and imposing "no restrictions or guidance on when or how the head of the contracting activity should exercise this authority. According to this respondent, if there are no reasonable restrictions on granting of waivers, then it is unlikely that DoD's practice will change.

Response: The requirement to resolicit for an additional 30 days may be waived by the head of the contracting activity (HCA). The intent of including this waiver provision is to maintain flexibility and allow the HCA to exercise the authority of the position. Typically, this position is filled by a senior acquisition professional who has demonstrated sound business judgment and acumen. DoD relies on those in charge to exercise good judgment in the

execution of their duties. This waiver authority cannot be delegated below one level above the contracting officer. DoD has not seen evidence of abuse of this waiver authority.

Comment: One respondent recommended that the rule should allow requesting a waiver of the requirement to resolicit for an additional 30 days if the contracting officer has determined fair and reasonable prices through price or cost analysis or negotiations with the offeror, and the waiver has been approved by the PARC (Principal Assistant Responsible for Contracting).

Response: The purpose of the 30-day resolicitation requirement is to promote effective competition. Determination that the offered price is fair and reasonable may provide supporting rationale for granting a waiver, but does not by itself constitute sufficient grounds to grant a waiver. More important reasons for granting a waiver would be urgency of the requirement or market research that indicates that an additional 30 days is unlikely to result in additional offers.

The final rule continues to allow the waiver authority to be delegated to one level above the contracting officer (which would include the PARC). An approval one level above the contracting officer ensures a layer of review and provides a mechanism for checks and balances. Waiver of the 30-day resolicitation period does not relieve the contracting officer of the need to determine the price fair and reasonable.

6. Applicability to Parts Other Than DFARS Parts 214 and 215

a. Part 208

Comment: Several respondents recommended that the proposed rule should not apply to DFARS subpart 208.4, Federal Supply Schedules.

i. Timing and Complexity

Comment: One respondent stated that the purpose for the GSA Federal Supply Schedule is to provide the Government an expedited means to procure commercial supplies and services at the substantially lower costs associated with volume buying. Therefore, expanding the DoD memos to DFARS subpart 208.4 (as well as DFARS parts 212, 213, and 216), "eviscerates their intention" and will overload the acquisition process.

Another respondent provided an example of an agency that frequently posts RFQs using the GSA eBuy tool for fewer than 30 days. The RFQs are available to all vendors on the relevant GSA schedule. Although multiple

responses are generally received, occasionally there is only one quote received. According to this respondent, lengthening the RFQ response time to 30 days would impede the goal of simplifying and streamlining the procurement process.

Response: DoD recognizes that the Federal Supply Schedule program directed and managed by GSA provides a simplified and flexible process for obtaining commercial supplies and services. The schedule program, because it does not require contracting officers to seek competition outside of the schedule holders or to synopsise the requirement, can be very efficient. DoD also believes that effective competition promotes greater efficiency and productivity in defense spending, and that DoD needs to do more to promote competition when only one offer is received in response to a competitive solicitation. The final rule requires, when only one offer is received in response to a competitive solicitation, that the contracting officer promote competition by trying to revise the requirements document and by permitting more time for receipt of offers. In addition, the final rule does not eliminate the efficiencies or flexibilities inherent in FAR part 8 transactions.

RFQs using the GSA eBuy tool are frequently posted for less than 30 days and generally receive more than one response. The final rule still permits requests for quotation to be solicited for fewer than 30 days, and only requires a resolicitation for 30 days (or a waiver) in those cases when only one offer was received. Market research can provide contracting officers the insight required to determine the solicitation response time required to ensure effective competition without needlessly lengthening the RFQ response time to 30 days. In many cases, market research will indicate that multiple offers will be received in response to an RFQ open for under 30 days. In other cases, market research will indicate that contracting officers need to keep RFQs open for 30 days to encourage effective competition. Finally, market research will indicate that additional time will likely not result in additional offers, and provide contracting officers with the rationale to support a waiver of the resolicitation requirement.

ii. Authority of GSA

Comment: One respondent stated that GSA is vested with the exclusive statutory authority for the pricing policies and procedures governing contracts and orders under the Federal Supply Schedule (40 U.S.C. chapter 5

and 41 U.S.C. 152(3)). Any modifications must be approved by GSA and incorporated into the General Services Acquisition Regulation (GSAR).

Response: DoD understands GSA's exclusive statutory authority for directing and managing the Federal Supply Schedule (FSS) program, and is not modifying the FSS program with this final rule. Instead, the final rule merely supplements GSA's existing guidance on the FSS program to ensure FSS program use by DoD contracting officers is consistent with DoD's policies for promoting competition. Specifically, the final rule augments GSA's policies and procedures for the FSS program by providing DoD contracting officers specific instructions when only one offer is received in response to a competitive FSS solicitation. DoD has periodically issued additional guidance and instructions to govern use of the FSS within DoD.

iii. Sufficiency of FAR and GSAR Processes

Comment: According to several respondents, the proposed regulations are unnecessarily duplicative, because the FAR and the GSAR already provide a framework for the effective and efficient procurement of goods and services at fair and reasonable prices. The respondents noted that under the FSS, GSA has already determined that the prices for products and the rates for services are fair and reasonable (FAR 8.404(d)). According to the respondents, ordering agencies are not required to make a separate determination of fair and reasonable prices of supplies and fixed price services, except for a price evaluation as required by FAR 8.405–2(d). In such cases, agencies are only responsible for considering the level of effort and labor mix and making a determination whether the total price is fair and reasonable.

Response: Existing regulations already anticipate that contracting officers can achieve prices below those determined fair and reasonable by GSA by pursuing additional competition and/or price negotiations. Even though GSA has already negotiated fair and reasonable pricing under the FSS program, the FAR permits contracting officers to seek additional discounts before placing an order. Agencies are required to seek price reductions from the fair and reasonable contract prices for orders exceeding the simplified acquisition threshold (see FAR 8.405–4). As a practical matter, contracting officers routinely achieve such impressive discounts that award at published FSS prices is discouraged. Similarly, existing

DFARS regulations provide specific guidance to DoD contracting officers that govern competitions under FSS.

The final rule provides specific guidance to DoD contracting officers when only one offer is received. The final rule augments existing DoD guidance on FSS competitions. The final rule also provides additional guidance to DoD contracting officers that govern the establishment of price in one offer competitions. The final rule is consistent with the existing requirements for competitions under the FSS program and with the standard for determining fair and reasonable prices.

iv. Technical

Comment: One respondent stated that the threshold of “exceeding \$150,000” at DFARS 208.405–70(c)(1), which provides criteria for orders placed on a competitive basis, appears to create a conflict with DFARS 215.371(e)(ii), which creates no threshold for the “attack items,” i.e., items to facilitate against or recovery from nuclear, biological, chemical, or radiological attack.

Response: The final rule supplements, but does not conflict with, the competition requirements in DFARS 208.405–70(c)(1). The final rule provides additional policies and procedures when one offer is received in response to a competitive solicitation. The final rule, at DFARS 215.371–4, exempts certain acquisitions, including “attack items” from the new policies and procedures for one offer competitions.

Comment: One respondent noted that FAR 8.404 specifically states that FAR part 15 is not applicable to FSS orders. Therefore, this statement would have to be addressed in the DFARS, in order to make DFARS part 215 applicable.

Response: As requested by the respondent, the final rule adds specific language at DFARS 208.404(a) to make DFARS 215.371 applicable.

Comment: One respondent recommended creating a clause for orders (DFARS 208.405–70(d) and 215.506(S–70)).

Response: The final rule includes provisions at DFARS 252.215–7007, Notice of Intent to Resolicit, and DFARS 252.215–7008, Only One Offer, that apply to all competitive acquisitions, including orders, subject to the final rule. The final rule does not include an additional clause for orders.

b. Part 212

Several respondents recommended that the proposed rule should not apply to commercial items (DFARS part 212), for the following reasons:

i. Timeframe for Response

Comment: Several respondents noted that FAR 12.205(c) specifically provides for fewer than 30 days response time for receipt of offers for commercial items. One respondent stated that the proposed rule is inconsistent with FAR 12.205(c). Another respondent noted that acquisition requirements and processes for the procurement of commercial items were supposed to more closely resemble those customarily used in the commercial marketplace, which the respondent considers to be the reason for allowing shorter response times for receipt of offers for commercial items. This respondent noted that the DFARS proposed rule does not foster the policy behind commercial item acquisitions. A third respondent noted that there is an expectation that an agency can acquire IT in 30 days or fewer, in order to respond to a cyber threat. However, according to the respondent, contracting officers will never be able to respond in 30 days or fewer, because by default, an agency will post the request for quote for the required 30 days, just to avoid the risk of having to do it over again.

Response: Current regulations permit response times under 30 days for commercial items. Shorter response times may more closely resemble commercial practice and may speed the acquisition of critical IT and other items. The final rule still permits response times under 30 days, and only requires a resolicitation for 30 days (or a waiver) in those cases when only one offer was received. Market research can provide contracting officers the insight required to determine the solicitation response time required to ensure effective competition without needlessly lengthening every solicitation's response time to 30 days. In many cases, market research will indicate that multiple offers will be received in response to an RFP/RFQ open for fewer than 30 days. In other cases, market research will indicate that contracting officers need to give potential offerors at least 30 days to encourage effective competition. Similarly, market research will indicate those cases where additional time will likely not result in additional offers, and will provide contracting officers with the rationale to support a waiver of the resolicitation requirement. The final rule also recognizes that certain requirements are too urgent to permit a 30-day solicitation response period, and includes an exception for acquisitions in support of contingency, humanitarian or peacekeeping operations, or to facilitate defense against or recovery from nuclear, biological, chemical, or

radiological attack. Finally, the final rule also permits waivers of the 30-day resolicitation requirement, when necessary and justified.

ii. Other Ways To Determine Fair and Reasonable Prices

Comment: One respondent suggested that excluding commercial contracts would be one means to narrow the scope of the proposed rule to those contracts that might return the highest level of benefit. The respondent noted that in the case of commercial contracts, competitive pricing can often be verified without resort to additional data from the contractor, which is one reason that the law prohibits requesting certified cost or pricing data for commercial contracts.

Response: Competitive pricing can often be verified without resort to additional data from the contractor. The final rule has been revised to provide that, when a single offer is received in response to a competitive solicitation, the contracting officer should try to determine through cost or price analysis that the offered price is fair and reasonable and whether an exception to the requirement for certified cost or pricing data applies, before requesting any additional data from the contractor. The final rule refers contracting officers to the existing exceptions to the requirement to submit certified cost or pricing data, including the commercial item exception.

iii. Access to the DoD Market

Comment: One respondent viewed the application of the proposed rule to acquisition of commercial items as an added barrier to entry into the DoD market.

Response: Typically, commercial vendors cite the requirement for certified cost or pricing data as a key deterrent to doing business with the DoD. The final rule does not change the commercial item exemption to the requirement for certified cost or pricing data. In addition, by ensuring adequate proposal preparation time is provided to potential offerors, the final rule encourages commercial item vendors to participate in DoD's competitions. Finally, the final rule implements key policies necessary to improve the efficiency and productivity of DoD's procurements. While DoD does not believe that the final rule creates barriers to entry, commercial vendors will need to make business decisions about their participation in the DoD marketplace.

c. Subpart 13.5

The FAR subpart 13.5 test program is no longer in effect. The final rule deletes all references to the FAR subpart 13.5 test program.

d. Part 216

Various respondents did not agree with application of the proposed rule to DFARS part 216.

i. 30-Day Resolicitation

Comment: One respondent stated that the rule should clarify whether the 30-day requirement also applies to delivery/task orders solicited under a multiple award/indefinite-delivery/indefinite-quantity type contract, noting that competition is limited to the primes under these contracts. Another respondent stated that the proposed rule should not require resolicitation for an additional 30 days if the other prime contractors indicate that they will not provide an offer if additional days are provided.

Another respondent stated that the rule should not apply to multiple-award contracts when only two or three contractors were awarded the base contract, and one or more of the base contract awardees is excluded from submitting a proposal due to an organizational conflict of interest. In such case, only receiving one proposal will not be the result of inadequate competition and 30-day resolicitation would interfere with deliveries without resulting in increased competition.

Response: The final rule applies to the prime contractor awardees in a multiple-award contract scenario. If the prime contractors state that they are not going to provide an offer if additional days are provided, or if there is an organizational conflict of interest for one or more of the prime contractors, then the contracting officer may pursue a waiver to the 30-day resolicitation requirement in accordance with DFARS 215.371-5 of the final rule.

ii. Adequate Price Competition

Comment: One respondent stated that multiple-award contracts are already awarded based on adequate price competition.

Response: Consistent with the fair opportunity rules at FAR 16.505(b), the final rule is intended to promote real competition when only one offer is received to ensure the integrity of the competitive contracting process is maintained for each task or delivery order, even when the multiple-award contracts were awarded based on adequate price competition.

iii. Cost or Pricing Data

Comment: One respondent stated that cost or pricing data was submitted and evaluated at time of award and does not need to be submitted if only one offer is received.

Response: Even if cost or pricing data was submitted at the time of award, the contracting officer must consider price or cost in the selection decision as one of the factors for each task or delivery order issued. If only one offer is received for a task or delivery order, the contracting officer may not rely on adequate price competition to determine that the price of the task or delivery order is fair and reasonable. The contracting officer may make the determination that the offered price is fair and reasonable and is based on adequate price competition (approved one level above the contracting officer) or that another exception to the requirement for certified cost or pricing data applies. However, if the contracting officer cannot make this determination and must request additional cost or pricing data, that cost or pricing data must be certified unless an exception applies.

e. Part 219

Comment: One respondent recommended that the proposed rule should not apply to small business set-asides. Another respondent requested clarification as to whether the proposed rule was intended to be applicable to small business programs. Although the rule did not specifically make any changes to FAR part 19, there may be impact through references in FAR 19.502-4 (Methods of conducting set-asides) to conducting the set-aside using the procedures of FAR parts 13, 14, or 15; and FAR 19.806 (Pricing the 8(a) contract) requires the contracting officer to price the 8(a) contract in accordance with FAR subpart 15.4. More specifically, the respondent pointed to FAR 19.502-2(a), which provides that "If the contracting officer received only one acceptable offer from a responsible small business concern in response to a set-aside, the contracting officer should make an award to that firm." There is comparable language in FAR 19.1305(c) for HUBZone set-asides, 19.1405(c) for service-disabled veteran-owned small business set-aside procedures, 19.1505(d) for women-owned small business program set-asides.

Response: An exception has been added at DFARS 215.371-4(b) to the 30-day resolicitation requirement at DFARS 215.371-2. The final rule does not preclude any requirement that was set-aside under the authority of FAR

19.1305, 19.1405 or 19.1505 from being awarded, if only one acceptable offer was received.

The intent still is to ensure that prices and/or costs obtained by the offeror are fair, reasonable, and in the best interest of the Government, even by small businesses. Based on market research, the contracting officer is reasonably expected not to set-aside a requirement for competition, unless there is a "reasonable expectation that offers will be received from two or more small business concerns and that award will be made at a fair market price." If only one acceptable offer is received from a competitive set-aside, then the procedures at DFARS 215.371-3 for determination of a fair and reasonable price apply equally to small business set-asides.

f. Part 235

Comment: One respondent recommended that the final rule should explicitly exclude competitions for basic and applied research conducted under FAR 35.016. The respondent commented that, although the proposed rule does not address research competitions under FAR 35.016 utilizing Broad Agency Announcements as the solicitation method, the amplifying memorandum of April 27, 2011, stated that the policy applies to all competitive procurements of supplies and services that exceed the simplified acquisition threshold. The respondent provided several reasons why the entire issue of "one bid" is problematic for broad agency announcements, because offers under broad agency announcement sometimes trickle in over an extended open period, and often individual offers can be entertained at any time.

Response: Although the final rule does not specifically address FAR part 35, acquisitions under FAR part 35 are generally subject to the procedures of FAR part 15 and DFARS part 215. The procedures of DFARS 215.371 should not apply to broad agency announcements under FAR 35.006. The requirement for resolicitation if the original solicitation is for less than 30 days is not likely to affect a broad agency announcement, because they are usually issued for an extended period of time. However, because contracts awarded under broad agency announcements, although competitively awarded, are not awarded on the basis of price competition, the approach at DFARS 215.371 would not be appropriate for a broad agency announcement. Responses to a broad agency announcement are expected to propose varying technical/scientific

approaches. Proposals need not be evaluated against each other since they are not submitted in accordance with a common work statement. Therefore, to make it clear that DFARS 215.371 does not apply to awards under broad agency announcement, an exception has been added at DFARS 215.371-4(a)(1)(iii). DFARS 215.371-4(a)(2) states that the applicability of an exception does not eliminate the need for the contracting officer to ensure that the price is fair and reasonable.

7. Regulatory Flexibility

Two respondents questioned the Initial Regulatory Flexibility Analysis (IRFA) and made recommendations for reducing the impact on small business.

Comment: These respondents questioned the assertion that the rule will not affect small business entities. One respondent stated that 5,148 small business awards over \$150,000 is not an insubstantial figure. Another respondent stated that there could be adverse effects, especially with respect to commercial and low-dollar contracts sought by small businesses. According to this respondent, small businesses may be disproportionately impacted, because they may lack the resources to provide cost or pricing data. Another respondent disagreed with the conclusion of the IRFA that the burden for submission of cost or pricing data is already covered in the FAR. According to this respondent, the IRFA did not acknowledge that this rule will increase the requirement for submission of cost or pricing data by small businesses, because submission of cost or pricing data is not currently a requirement for full and open competition.

Response: The final rule has, however, reduced the impact on all businesses, including small businesses. As rewritten, the final rule is not inconsistent with the current FAR requirements to determine that the price is fair and reasonable when only one offer is received. It uses the FAR clause 52.215-20, but includes a mechanism whereby the FAR clause only becomes effective if only one offer is received, and the contracting officer cannot determine that the offered price is fair and reasonable without requiring additional data. This is part of the current FAR requirement to determine that adequate price competition exists if only one offer is received.

With regard to impact on commercial and low-dollar value contracts sought by small businesses, the rule does not apply to all contracts with dollar values below the simplified acquisition threshold. For acquisitions above the simplified acquisition threshold, the

contracting officer will only request the data necessary to determine a fair and reasonable price. No certified cost or pricing data is required for commercial items. A small business that is offering items to the Government in quantities that exceed the simplified acquisition threshold and are not commercial items should have an accounting system adequate to provide cost or pricing data upon request.

Comment: Another comment on the IRFA was that it does not explain the relationship between the submission of cost or pricing data and increased competition.

Response: As clarified in the revised policy of the final rule, there is no relationship between submission of cost or pricing data and increased competition. The submission of cost or pricing data is to determine whether the offered price is fair and reasonable, when the efforts to increase competition nevertheless resulted in only one offer and the contracting officer could not make that determination without additional data.

Comment: One respondent further recommended exclusion of—

- Set-asides for small business; and
- Acquisitions using full and open competition procedures that result in single offers from small businesses.

Response: An exception to the 30-day resolicitation requirement has been added at DFARS 215.371-4(b) for small business set-asides, because the FAR specifically provides at FAR 19.5, 19.305(c), 19.1405(c), and 19.1505(d) that if only one acceptable offer is received under these set-aside programs, the contracting officer should award to that concern.

The final rule does not include any exception for when the single offer comes from a small business, because it is important to increase competition and allow all businesses sufficient time to respond to a solicitation, which could be of benefit to other small businesses.

In all cases, it is still essential to determine that the price is fair and reasonable.

8. Executive Order Requirements for Cost/Benefit Analysis

Comment: Two respondents commented on the need for cost/benefit analysis as required by Executive Orders 12866 and 13563. One respondent recommended that DoD should consider performing a cost/benefit analysis before finalizing the proposed rule. According to the respondent, the proposed rule will affect a significant number of procurements and may create burdens on procurement professionals and contractors that are not commensurate

with the benefits anticipated. Another respondent noted that there is a lack of empirical support for the proposed rule. According to the respondent, without further cost/benefit data to support the rulemaking, it fails to demonstrate that this rule is needed to cure the underlying problem of single offer competition.

Response: The purpose of this rule is not just to save money but to ensure the integrity of the process. More competition benefits all parties, including small businesses. Although it is possible to demonstrate that increased competition strengthens the industrial base and has a beneficial impact on pricing, the benefits are not readily quantifiable. DoD is tracking improvement in the percentage of effective competition (more than one offer). DoD has always had a fiduciary responsibility to determine that prices are fair and reasonable. The most basic pricing policy at FAR 15.402 is that the contracting officer shall purchase supplies and services from responsible sources at fair and reasonable prices. Unless certified cost or pricing data is required by law (see FAR 15.403–4), the contracting officer is required to obtain data other than certified cost or pricing data as necessary to establish a fair and reasonable price. This rule provides a mechanism to accomplish that goal when a competitive solicitation does not result in more than one offer. As revised, the final rule does not impose unnecessary burdens. See also the last response in section II.B.3.a. and the responses in section II.B.3.b.ii.

9. Additional Recommendations

a. Delay Implementation

Comments: One respondent recommended that DoD delay implementation of the rule until the Comptroller General studies one-offer contracts and issues a report (section 847 of the proposed Senate version of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2012 (S. 1253) requires such a review).

Response: The NDAA for FY 2012, as enacted, did not contain such a requirement for a study of one-offer contracts. DoD needs to take action to improve competition and ensure fair and reasonable prices. DoD will remain ready to reassess any future recommendations on how progress towards these goals can be improved.

b. Sunset Date

Comment: One respondent recommended that the rule should sunset automatically 12 months after the effective date, or, at the latest, at any

time after that if the DoD Competition Report data reveals that single offer competitions are 15 percent or less of the total number of acquisition awards.

Response: If the policies and procedures of this rule are beneficial, then there is no need to sunset them after a specific amount of time or if certain effective competition goals are reached. The policies of the final rule are sound policies to maintain, regardless of the percentage of effective competition achieved. Improvement in the rate of effective competition would imply that the policies are working. However, if effective competition is still only 85 percent, then the remaining 15 percent needs to be addressed, continuing to promote more effective competition and ensuring a fair and reasonable price.

c. Line Item for Cost or Pricing Data

Comment: One respondent recommended authorization or requirement that contracting officers include optional contract line items to pay directly for the provision of cost or pricing data not required at the time of submission.

Response: This cost or pricing data is requested prior to contract award and is still considered part of the bid or proposal costs, which are costs incurred in preparing, submitting, and supporting bids and proposals. Bid or proposal costs are only allowable as indirect expenses on contracts, to the extent that those costs are allocable and reasonable (FAR 31.205–18(c)).

d. Use of E-Proposals

Comment: One respondent requested authorization of broader use of e-proposals in the solicitation and contract formation processes in order to offset some of the timing burden caused by a 30-day solicitation period and/or by late notice of the solicitation's requirements to prospective offerors.

Response: E-solicitations and e-proposals are already broadly used. The solicitation can authorize electronic commerce methods for submission of offers. Some offerors prefer e-proposals, but others do not want e-proposals to be mandated. The goal of this rule is to provide sufficient time for interested offerors to respond.

e. Market Research and Price Analysis Capability

Comment: One respondent recommended training and rewarding of market research capability and price analysis capability within each DoD component or the centralization of market research capability.

Response: This recommendation is outside the scope of this rule.

f. Support Enhanced Communication

Comment: One respondent recommended continued support of enhanced communication with industry about requirements and solutions throughout the acquisition cycle.

Response: DoD wholly supports this recommendation.

10. Technical

Comment: One respondent suggested that the coverage should be at DFARS subpart 215.4 rather than DFARS 215.371.

Response: The reason for putting the coverage in DFARS 215.371 rather than in DFARS subpart 215.4 is because the rule covers more than just contract pricing. It also involves seeking to increase competition through review of the requirements and ensuring adequate time for submission of offers.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

A Final Regulatory Flexibility Analysis has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, and is summarized as follows:

This rule implements the initiative on promoting real competition that was presented by the Under Secretary of Defense for Acquisition, Technology, & Logistics in a memorandum dated November 3, 2010. The objective of the rule is to promote competition and ensure fair and reasonable prices, by implementing DoD policy with regard to acquisitions when only one offer is received to ensure that—

- Adequate time is allowed for receipt of offers;

- The requirements do not present unnecessary barriers to competition; and
- Cost or pricing data is obtained and negotiations are held, as necessary, to obtain a fair and reasonable price, when only one offer is received in response to a competitive solicitation and the contracting officer cannot determine

that the offered price is fair and reasonable.
 The legal basis is 41 U.S.C. 1303 and 48 CFR chapter 1.
 Two respondents questioned the Initial Regulatory Flexibility Analysis and made recommendations for reducing the impact on small business. See section II.B.7 for analysis of public comments on regulatory flexibility.

No comments were filed by the Chief Counsel for Advocacy of the Small Business Administration.

The proposed rule provided the following data: that it would affect all small entities that respond to a Federal solicitation for proposals, valued at more than \$150,000, and no other offer is received.

TABLE—DOD COMPETITIVE AWARDS VALUED ABOVE \$150,000

	All	Only one offer	1 Offer/SB
New Contracts or P.O.	54,240	14,747	3,542
New Orders under FSS	4,246	1,654	818
New Orders, Non-Part 8	12,883	2,935	788

The impact of this rule has been reduced significantly by eliminating the requirement for additional data and subsequent negotiation if the contracting officer can determine that the offered price is fair and reasonable and that adequate price competition exists (approved at one level above the contracting officer).

The rule imposes no reporting, recordkeeping, or other information collection requirements. The submission of certified cost or pricing data or other than certified cost or pricing data is covered in FAR subpart 15.4 and associated clauses in FAR 52.215, OMB clearances 9000–013.

There are no known significant alternatives to the rule that would adequately implement the DoD policy. DoD considered higher thresholds for applicability of the rule (cost or pricing data threshold or \$10 million), but determined that higher thresholds would be detrimental to the effectiveness of the rule. There is no significant economic impact on small entities. The impact of this rule on small business is expected to be predominantly positive, by allowing more opportunity for competition.

V. Paperwork Reduction Act

The rule does not impose any additional information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35). The submission of certified cost or pricing data or data other than certified cost or pricing data required to assess whether a price is fair and reasonable is covered in FAR subpart 15.4 and associated clauses in FAR 52.215, OMB clearance number 9000–013, in the amount of 10,101,684 hours.

List of Subjects in 48 CFR Parts 205, 208, 212, 214, 215, 216, 252

Government procurement.

Ynette R. Shelkin,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 205, 208, 212, 214, 215, 216, and 252 are amended as follows:

PART 205—PUBLICIZING CONTRACT ACTIONS

■ 1. The authority citation for 48 CFR part 205 is revised to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

■ 2. Amend section 205.203 by adding paragraph (S–70) to read as follows:

205.203 Publicizing and response time.
 * * * * *

(S–70) When using competitive procedures, if a solicitation allowed fewer than 30 days for receipt of offers and resulted in only one offer, the contracting officer shall resolicit, allowing an additional period of at least 30 days for receipt of offers, except as provided in 215.371–4 and 215.371–5.

PART 208—REQUIRED SOURCES OF SUPPLIES AND SERVICES

■ 3. The authority citation for 48 CFR part 208 is revised to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

■ 4. Revise section 208.404 to read as follows:

208.404 Use of Federal Supply Schedules.

(a)(i) In accordance with 208.405–70(c)(2), if only one offer is received in response to an order exceeding \$150,000 that is placed on a competitive basis, the procedures at 215.371 apply.

(ii) Departments and agencies shall comply with the review, approval, and reporting requirements established in accordance with subpart 217.78 when placing orders for supplies or services in amounts exceeding the simplified acquisition threshold.

(iii) When a schedule lists both foreign and domestic items that will meet the needs of the requiring activity, the ordering office must apply the procedures of part 225 and FAR part 25, Foreign Acquisition. When purchase of an item of foreign origin is specifically required, the requiring activity must furnish the ordering office sufficient information to permit the determinations required by part 225 and FAR part 25 to be made.

■ 5. Amend section 208.405–70 by revising paragraph (c), redesignating paragraph (d) as paragraph (e), and adding new paragraph (d) to read as follows:

208.405–70 Additional ordering procedures.
 * * * * *

(c)(1) An order exceeding \$150,000 is placed on a competitive basis only if the contracting officer provides a fair notice of the intent to make the purchase, including a description of the supplies to be delivered or the services to be performed and the basis upon which the contracting officer will make the selection, to—

(i) As many schedule contractors as practicable, consistent with market research appropriate to the circumstances, to reasonably ensure that offers will be received from at least three contractors that can fulfill the requirements, and the contracting officer—

(A)(1) Receives offers from at least three contractors that can fulfill the requirements; or

(2) Determines in writing that no additional contractors that can fulfill the requirements could be identified despite reasonable efforts to do so (documentation should clearly explain efforts made to obtain offers from at least three contractors); and

(B) Ensures all offers received are fairly considered; or

(ii) All contractors offering the required supplies or services under the applicable multiple award schedule, and affords all contractors responding to the notice a fair opportunity to submit an offer and have that offer fairly considered.

(2) If only one offer is received, follow the procedures at 215.371.

(d) Use the provisions at 252.215–7007, Notice of Intent to Resolicit, and 252.215–7008, Only One Offer, as prescribed at 215.408(3) and (4), respectively.

* * * * *

PART 212—ACQUISITION OF COMMERCIAL ITEMS

■ 6. The authority citation for 48 CFR part 212 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

■ 7. Add section 212.205 to read as follows:

212.205 Offers.

(c) When using competitive procedures, if only one offer is received, the contracting officer shall follow the procedures at 215.371.

■ 8. Amend section 212.301 by redesignating paragraphs (f)(iv)(F) through (N) as paragraphs (f)(iv)(G) through (O) and adding new paragraph (f)(iv)(F) to read as follows:

212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

(f) * * *
(iv) * * *

(F) Use the provisions at 252.215–7007, Notice of Intent to Resolicit, and 252.215–7008, Only One Offer, as prescribed at 215.408(3) and (4), respectively.

* * * * *

PART 214—SEALED BIDDING

■ 9. The authority citation for 48 CFR part 214 is revised to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

■ 10. Add section 214.201–6 to read as follows:

214.201–6 Solicitation provisions.

(2) Use the provisions at 252.215–7007, Notice of Intent to Resolicit, and 252.215–7008, Only One Offer, as prescribed at 215.408(3) and (4), respectively.

■ 11. Add section 214.209 to read as follows:

214.209 Cancellation of invitations before opening.

If an invitation for bids allowed fewer than 30 days for receipt of offers, and resulted in only one offer, the contracting officer shall cancel and resolicit, allowing an additional period of at least 30 days for receipt of offers, as provided in 215.371.

■ 12. Revise section 214.404–1 to read as follows:

214.404–1 Cancellation of invitations after opening.

(1) The contracting officer shall make the written determinations required by FAR 14.404–1(c) and (e)(1).

(2) If only one offer is received, follow the procedures at 215.371 in lieu of the procedures at FAR 14.404–1(f).

■ 13. Add sections 214.408 and 214.408–1 to subpart 214.4 to read as follows:

214.408 Award.

214.408–1 General.

(b) For acquisitions that exceed the simplified acquisition threshold, if only one offer is received, follow the procedures at 215.371.

PART 215—CONTRACTING BY NEGOTIATION

■ 14. The authority citation for 48 CFR parts 215, 216, and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

■ 15. Add sections 215.371 through 215.371–5 to subpart 215.3 to read as follows:

Subpart 215.3—Source Selection

Sec.

* * * * *

215.371 Only one offer.

215.371–1 Policy.

215.371–2 Promote competition.

215.371–3 Fair and reasonable price.

215.371–4 Exceptions.

215.371–5 Waiver.

215.371 Only one offer.

215.371–1 Policy.

It is DoD policy, if only one offer is received in response to a competitive solicitation—

(a) To take the required actions to promote competition (see 215.371–2); and

(b) To ensure that the price is fair and reasonable (see 215.371–3) and to comply with the statutory requirement for certified cost or pricing data (see FAR 15.403–4).

215.371–2 Promote competition.

Except as provided in sections 215.371–4 and 215.371–5, if only one offer is received when competitive procedures were used and the solicitation allowed fewer than 30 days for receipt of proposals, the contracting officer shall—

(a) Consult with the requiring activity as to whether the requirements document should be revised in order to promote more competition (see FAR 6.502(b) and 11.002); and

(b) Resolicit, allowing an additional period of at least 30 days for receipt of proposals.

215.371–3 Fair and reasonable price.

(a) If there was “reasonable expectation . . . that two or more offerors, competing independently, would submit priced offers” but only one offer is received, this circumstance does not constitute adequate price competition unless an official at one level above the contracting officer approves the determination that the price is reasonable (see FAR 15.403–1(c)(1)(ii)).

(b) Except as provided in section 215.371–4(a), if only one offer is received when competitive procedures were used and the solicitation allowed at least 30 days for receipt of proposals (unless the 30-day requirement is not applicable in accordance with 215.371–4(b) or has been waived in accordance with section 215.371–5), the contracting officer shall—

(1) Determine through cost or price analysis that the offered price is fair and reasonable and that adequate price competition exists (with approval of the determination at one level above the contracting officer) or another exception to the requirement for certified cost or pricing data applies (see FAR 15.403–1(c) and 15.403–4). In these circumstances, no further cost or pricing data is required; or

(2)(i) Obtain from the offeror cost or pricing data necessary to determine a fair and reasonable price and comply with the requirement for certified cost or pricing data at FAR 15.403–4, in accordance with FAR provision 52.215–20. For acquisitions that exceed the cost or pricing data threshold, if no exception at FAR 15.403–1(c) applies, the cost or pricing data shall be certified; and

(ii) Enter into negotiations with the offeror as necessary to establish a fair and reasonable price. The negotiated price should not exceed the offered price.

215.371-4 Exceptions.

(a)(1) The requirements at sections 215.371-2 and 215.371-3 do not apply to acquisitions—

(i) At or below the simplified acquisition threshold;

(ii) In support of contingency, humanitarian or peacekeeping operations, or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack; or

(iii) Of basic or applied research or development, as specified in FAR 35.016(a), that use a broad agency announcement.

(2) The applicability of an exception in paragraph (a)(1) of this section does not eliminate the need for the contracting officer to seek maximum practicable competition and to ensure that the price is fair and reasonable.

(b)(1) The requirements at section 215.371-2 do not apply to small business set-asides under FAR subpart 19.5 or set-asides under the HUBZone Program (see FAR 19.1305(c)), the Service-Disabled Veteran-Owned Small Business Procurement Program (see FAR 19.1405(c)), or the Woman-Owned Small Business Program (see FAR 19.1505(d)).

(2) The requirements at section 215.371-3 do apply to such set-asides.

215.371-5 Waiver.

(a) The head of the contracting activity is authorized to waive the requirement at 215.371-2 to resolicit for an additional period of at least 30 days.

(b) This waiver authority cannot be delegated below one level above the contracting officer.

■ 16. The 215.403 section heading is revised to read as follows:

215.403 Obtaining certified cost or pricing data.

■ 17. Section 215.403-1 is amended by revising paragraph (c)(1) to read as follows:

* * * * *

(c) *Standards for exceptions from certified cost or pricing data requirements—(1) Adequate price competition.*

(A) For acquisitions under dual or multiple source programs—

(1) The determination of adequate price competition must be made on a case-by-case basis. Even when adequate price competition exists, in certain cases it may be appropriate to obtain

additional information to assist in price analysis.

(2) Adequate price competition normally exists when—

(i) Prices are solicited across a full range of step quantities, normally including a 0-100 percent split, from at least two offerors that are individually capable of producing the full quantity; and

(ii) The reasonableness of all prices awarded is clearly established on the basis of price analysis (see FAR 15.404-1(b)).

(B) If only one offer is received in response to a competitive solicitation, see 215.371-3.

* * * * *

■ 18. Amend section 215.408 by adding paragraphs (3) and (4) to read as follows:

215.408 Solicitation provisions and contract clauses.

* * * * *

(3) Use the provision at 252.215-7007, Notice of Intent to Resolicit, in competitive solicitations that will be solicited for fewer than 30 days, unless an exception at 215.371-4 applies or the requirement is waived in accordance with 215.371-5.

(4)(i) Use the provision at 252.215-7008, Only One Offer, in competitive solicitations, unless an exception at 215.371-4(a)(1) applies.

(ii) In solicitations that include 252.215-7008, Only One Offer, also include the provision at FAR 52.215-20, Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data, with any appropriate alternate as prescribed at FAR 15.408-1, but that provision will only take effect as specified in 252.215-7008.

PART 216—TYPES OF CONTRACTS

■ 19. Amend section 216.505-70 by revising paragraph (d) to read as follows:

216.505-70 Orders under multiple award contracts.

* * * * *

(d) When using the procedures in this subsection—

(1) The contracting officer should keep contractor submission requirements to a minimum;

(2) The contracting officer may use streamlined procedures, including oral presentations;

(3) If only one offer is received, the contracting officer shall follow the procedures at 215.371.

(4) The competition requirements in FAR part 6 and the policies in FAR subpart 15.3 do not apply to the

ordering process, but the contracting officer shall consider price or cost under each order as one of the factors in the selection decision; and

(5) The contracting officer should consider past performance on earlier orders under the contract, including quality, timeliness, and cost control.

■ 20. Amend section 216.506 by adding paragraph (S-70) to read as follows:

216.506 Solicitation provisions and contract clauses.

* * * * *

(S-70) Use the provisions at 252.215-7007, Notice of Intent to Resolicit, and 252.215-7008, Only One Offer, as prescribed at 215.408(3) and (4), respectively.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 21. Add sections 252.215-7007 and 252.215-7008 to read as follows:

252.215-7007 Notice of Intent to Resolicit.

As prescribed at 215.408(3), use the following provision:

NOTICE OF INTENT TO RESOLICIT (JUN 2012)

This solicitation provides offerors fewer than 30 days to submit proposals. In the event that only one offer is received in response to this solicitation, the Contracting Officer may cancel the solicitation and resolicit for an additional period of at least 30 days in accordance with 215.371-2.

(End of provision)

252.215-7008 Only One Offer.

As prescribed at 215.408(4), use the following provision:

ONLY ONE OFFER (JUN 2012)

(a) The provision at FAR 52.215-20, Requirements for Certified Cost or Pricing Data and Data other Than Certified Cost or Pricing Data, with any alternate included in this solicitation, does not take effect unless the Contracting Officer notifies the offeror that—

(1) Only one offer was received; and

(2) Additional cost or pricing data is required in order to determine whether the price is fair and reasonable or to comply with the statutory requirement for certified cost or pricing data (10 U.S.C. 2306a and FAR 15.403-3).

(b) Upon such notification, the offeror agrees, by submission of its offer, to provide any data requested by the Contracting Officer in accordance with FAR 52.215-20.

(c) If negotiations are conducted, the negotiated price should not exceed the offered price.

(End of provision)

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